(2)

No. 95-1594

Supreme Court, U.S.
FILED
MAY 1 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

BARBARA A. DEBUONO, M.D., in her capacity as New York State Commissioner of Health; KAREN SCHIMKE, in her capacity as New York State Executive Deputy Commissioner of Health; DEPUTY DIRECTOR, Division of Health Care Financing, Office of Health Systems Management, New York State Department of Health,

Petitioners,

v.

NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, by its Trustees, JOHN BOWERS, JAMES CAPO, FRANK LONARDO, WILLIAM P. LYNCH, M. BRIAN MAHER, JAMES P. MELIA, GERALD OWENS, and PETER VICKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF HEALTHCARE ASSOCIATION OF NEW YORK STATE AND AMERICAN HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

MARK THOMAS
HEALTHCARE ASSOCIATION OF NEW YORK STATE
74 North Pearl Street
Albany, NY 12207

FREDRIC J. ENTIN
AMERICAN HOSPITAL ASSOCIATION
One North Franklin
Chicago, Illinois 60606

JEFFREY J. SHERRIN *
PHILIP ROSENBERG
SHERRIN & GLASEL
74 North Pearl Street
Albany, New York 12207
(518) 465-1275
Counsel for Amici Curiae

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

18

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF AMICI CURIAE	2
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE ISSUES IN THIS CASE ARE OF CONSIDERABLE NATIONAL IMPORTANCE	5
II. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THE *TRAVELERS* DECISION OF THIS COURT	8
CONCLUSION	14

TABLE OF AUTHORITIES

CASES — Page

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981) 11
Boyle v. Anderson, 68 F.3d 1093 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1266 (1996) 4, 12
Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992) 13
FMC Corp. v. Holliday, 498 U.S. 52 (1990) 12
Ingersoll-Rand Co. v. McClendon, 498 U.S. 133 (1990) 11
Mackey v. Lanier Collection Agency & Service, 486 U.S. 825 (1988) 11
Malone v. White Motor Corp., 435 U.S. 497 (1978) 13
New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co., 115 S. Ct. 1671 (1995) ..... *passim*
NYSA-ILA Medical & Clinical Services Fund v. Axelrod, 27 F.3d 823 (2d Cir. 1994), *vacated and remanded*, 115 S. Ct. 1819 (1995), *ratified upon reconsideration*, 74 F.3d 28 (2d Cir. 1996) 13
NYSA-ILA Medical & Clinical Services Fund v. Axelrod, 74 F.3d 28 (2d Cir. 1996) ..... *passim*
Shaw v. Delta Air Lines, 463 U.S. 85 (1983) 12
United Wire, Metal & Machine Health & Welfare Fund v. Morristown Memorial Hospital, 995 F.2d 1179 (3d Cir.), *cert. denied*, 114 S. Ct. 382 (1993) 4

STATUTORY MATERIALS

Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* ..... *passim*
ERISA Section 514(b)(2) (codified at 29 U.S.C. § 1144(b)(2) (1994)) 10
ERISA Section 514(b)(2)(A) (codified at 29 U.S.C. § 1144(b)(2)(A) (1994)) 10
ERISA Section 514(b)(2)(B) (codified at 29 U.S.C. § 1144(b)(2)(B) (1994)) 11
MINN. STAT. § 295.582 (Supp. 1993) 13

TABLE OF AUTHORITIES—Continued

Page

N.Y. PUB. HEALTH LAW § 2807-d (McKinney 1993 & Supp. 1996) 2-3

OTHER MATERIALS

PATRICIA A. BUTLER AND ELIZABETH MITCHELL, HEALTH CARE PROVIDER NETWORKS: REGULATORY ISSUES FOR STATE POLICY MATTERS (National Academy for State Health Policy, Feb. 1996) 7
HOSPITAL TRUSTEES OF NEW YORK STATE, AN INTRODUCTION TO HEALTH CARE NETWORKS (1994) 7
James C. Robinson, *Health Care Purchasing and Market Changes in California*, HEALTH AFFAIRS, Winter 1995 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1594

BARBARA A. DEBUONO, M.D., in her capacity as New York State Commissioner of Health; KAREN SCHIMKE, in her capacity as New York State Executive Deputy Commissioner of Health; DEPUTY DIRECTOR, Division of Health Care Financing, Office of Health Systems Management, New York State Department of Health,

Petitioners,

v.

NYSA-ILA MEDICAL AND CLINICAL SERVICES FUND, by its Trustees, JOHN BOWERS, JAMES CAPO, FRANK LONARDO, WILLIAM P. LYNCH, M. BRIAN MAHER, JAMES P. MELIA, GERALD OWENS, and PETER VICKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF OF HEALTHCARE ASSOCIATION OF NEW YORK STATE AND AMERICAN HOSPITAL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

The Healthcare Association of New York State ("HANYS") and the American Hospital Association ("AHA") respectfully submit this brief as *amici curiae* in support of the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

Pursuant to Rule 37 of the Rules of this Court, the parties to this proceeding have consented to the request by HANYS and AHA to file a brief as *amici curiae*. Letters confirming their consent are being submitted with this brief to the Clerk of the Court.

INTEREST OF AMICI CURIAE

HANYS is a not-for-profit, tax-exempt trade association that represents over 220 public and private not-for-profit acute care general hospitals across the State of New York, as well as nursing homes, home health agencies, and other entities that are vitally interested in the preservation of a statewide system of comprehensive, readily-accessible, cost-effective and high quality health care. HANYS is the principal advocacy organization on behalf of New York's hospital industry and provides technical, administrative, legal and other services on behalf of its members.

Founded in 1898, the AHA is the primary national organization of hospitals in the United States. Its institutional members include approximately 80% of the nation's hospitals, and nearly 50,000 health care professionals hold individual membership. The AHA's corporate mission is to promote the quality of American health care for all people through leadership and assistance to hospitals and other health care organizations. To fulfill this mission, the AHA regularly participates in the judicial and legislative arenas to address important issues concerning federal and state health care reform in general and hospital regulation in particular.

HANYS and AHA support the Petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Second Circuit that held that the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, preempts a health care facility assessment ("HFA") under New York Public

Health Law § 2807-d to the extent it is applied to a hospital corporation established and operated by a self-insured employee benefit plan governed by ERISA. We seek review by this Court because the Second Circuit decision, while addressing a specific assessment against a limited class of hospitals, has implications that are much more far-reaching.

As leaders in the health care field, and as representatives of health care providers whose continued survival and service to society depend on equitable regulation, apportionment, and reimbursement of necessary costs, HANYS and AHA are vitally concerned that states retain the flexibility to assure equal access to affordable, high-quality health care, a goal that will be undermined if the decision of the Second Circuit Court of Appeals is permitted to stand. In light of the recent failure of Congress to enact comprehensive health care reform legislation, and uncertainties as to the future of such federal initiatives, it is likely that the states will be the primary venue of continued reform efforts. New York State has long been an innovative leader in attempting to provide affordable and quality health care to all of its residents.

SUMMARY OF ARGUMENT

The Second Circuit held in this case that ERISA bars a state from applying its general hospital gross receipts tax to hospitals operated by ERISA plans, resting its decision on the ground that the tax "depletes the Fund's assets directly, and thus has an immediate impact on the operations of an ERISA plan." *NYSA-ILA Medical & Clinical Servs. Fund v. Axelrod*, 74 F.3d 28, 30 (2d Cir. 1996). In doing so, the court considered the decision of this Court in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671 (1995) [hereinafter *Travelers*], to be irrelevant, saying that:

> [n]othing in *Travelers* undermines our reliance on the [New York law's] direct economic impact upon the Fund as a basis for finding ERISA pre-emption nor precludes a determination that a state law's direct economic impact on ERISA plans is sufficient for a finding of pre-emption.

NYSA-ILA Medical & Clinical Servs. Fund, 74 F.3d at 30. According to the Second Circuit, the *Travelers* decision is controlling only with respect to laws having an *indirect* economic effect on ERISA plans, and not to laws having a *direct* economic effect. *Id.*

This decision merits review for several reasons. Foremost, it is a serious misapplication of the principles set forth in *Travelers*. There, this Court concluded that a general state law was not preempted merely because it imposed costs on an ERISA plan, noting that any other view would lead to the "unsettling result" that "all laws with indirect economic effects on ERISA plans are pre-empted . . . ." *Travelers*, 115 S. Ct. at 1681. But, while the Second Circuit seized on the word "indirect" in distinguishing *Travelers*, it would be equally unsettling to conclude that all laws with *direct* economic effects on ERISA plans are preempted. Whether costs are imposed directly or indirectly, ERISA plans cannot claim an exemption from general laws regulating the provision of health care except, as noted in *Travelers*, to the extent that the laws can be found to conflict with the objectives of ERISA itself. It is *not* an objective of ERISA, however, to protect ERISA plans from any and all costs—direct or indirect—imposed by general state laws. *See Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1266 (1996); *United Wire, Metal & Machine Health & Welfare Fund v. Morristown Memorial Hosp.*, 995 F.2d 1179 (3d Cir.), *cert. denied*, 114 S. Ct. 382, 383 (1993).

The Second Circuit's analysis requires review by this Court because, if accepted, it would have wide-ranging

national consequences. If direct regulation of a hospital or health care system is preempted whenever it is operated by an ERISA plan, then it would follow that those facilities are free to disregard any state law regulating hospitals and other providers, including sanitary and staffing rules. But it was, in part, this very same prospect that prompted this Court to uphold the various surcharges at issue in *Travelers*, observing that disruption of general health care regulation could not have been the intent behind ERISA. *Travelers*, 115 S. Ct. at 1679-80. That conclusion does not change with the form of the charge, and the decision below would thus create a serious and unjustified impediment to the ability of states to regulate the provision of health care within their borders.

These consequences are so dramatic that the *amici* will explain first what these consequences are, and then why the Second Circuit rationale is so inconsistent with *Travelers*.

ARGUMENT

I. THE ISSUES IN THIS CASE ARE OF CONSIDERABLE NATIONAL IMPORTANCE.

This case raises issues of enormous consequence to the traditional regulation of health care. The Second Circuit's sole reason for distinguishing this Court's decision in *Travelers* was that the costs of the laws challenged in *Travelers* were only "indirectly" borne by ERISA plans, whereas the HFA was "directly" imposed upon such plans.[1] *NYSA-ILA Medical & Clinical Servs. Fund*, 74 F.3d at 30 ("[U]nlike in *Travelers*, there is no third party between the plan and the tax imposed pursuant to the HFA. Rather, the statute at issue depletes the Fund's assets directly . . . ."). But if a state regulation is preempted simply because it increases a plan's costs without

[1] The direct/indirect dichotomy is not limited to health care and, therefore, raises similar implications with respect to other arenas in which ERISA plans may operate, such as education.

an intervening third party, then all ERISA plan-owned or operated hospitals, clinics and other health care entities will be immune from assessments similar to the HFA.[2] Such a conclusion also necessarily would immunize hospitals and other health care entities operated by ERISA plans from traditional exercises of the police power applicable to those entities, since such laws would have an "immediate impact on the operations of" the plan. *Id.* It would thus follow from the Second Circuit's decision that an ERISA plan would be free to operate a hospital, clinic or home care agency without regard to state medical waste and staffing rules since they too would have a "direct" and "immediate" impact. The plan would be equally free to establish a hospital in total disregard of state licensure laws. This immunity from state regulation will encourage plans to discontinue providing health care to their members through the system of community-based providers, and to establish their own facilities.

The impact of the Second Circuit decision is even more far reaching, given the explosion in the 1990's of integrated delivery systems, generally referred to as health care networks.[3] This phenomenon is an outgrowth of the competitive pressures caused by managed care, which followed from the growth of health maintenance organiza-

[2] At lease 19 states have enacted some form of health care provider tax. *See* Brief for *Amicus Curiae* for the States of Connecticut, *et al.* at 8, n.2.

[3] A network is a term that covers a broad range of relationships, from joint purchasing to the provision of a full range of health care services, oftentimes including the assumption of risk by an entity that enrolls participants. Organizationl arrangements may be among similar providers (*e.g.*, two or more hospitals linked to provide services)—referred to as horizontal integration—or they may involve various levels of providers (*e.g.*, hospital/physician group/nursing home)—commonly referred to as vertical integration. These networks may also involve the participation, through contractual or common ownership arrangements, of payers, such as self-insured employers or managed care plans.

tions. ERISA funds are not outsiders looking in on this health care revolution. They are integrally involved in the formation of networks, as they have the same cost pressures and other considerations all payers and providers have.

In 1994, the Hospital Trustees of New York State reported that 45% of acute care facilities surveyed nationwide had formed an integrated delivery system in the preceding twelve months, and that another 25% indicated that they would enter into some form of integrated care in the coming six months.[4] In New York City, hospital system and network formation has been so great that another 1994 survey conducted by the Greater New York Hospital Association reported that 82% of respondents were already in at least one network or system, more than 1 in 3 reported being in two or more networks, and almost half were part of a system in which they had equity or ownership in a managed care organization.[5] While there are many reasons for the formation of networks, "the most pressing is the clear indication that the healthcare reform discussions will result in some financing system that will reward the efficiencies suggested by streamlining and integrating care through networks."[6]

The test for ERISA preemption, as applied by the Second Circuit, poses major problems as ERISA funds develop or participate in these networks.[7] The *NYSA-*

[4] HOSPITAL TRUSTEES OF NEW YORK STATE, AN INTRODUCTION TO HEALTH CARE NETWORKS i (1994).

[5] *Id.* at 6.

[6] *Id.* at i.

[7] The National Academy for State Health Policy has already expressed concern regarding the ability of states to exercise their traditional police powers over health care provider networks under ERISA. *See* PATRICIA A. BUTLER & ELIZABETH MITCHELL, HEALTH CARE PROVIDER NETWORKS: REGULATORY ISSUES FOR STATE POLICY MATTERS (National Academy for State Health Policy, Feb. 1996). The National Academy report specifically questions whether ERISA

ILA decision of the Second Circuit, if allowed to stand, will immunize entire health networks from state regulation, and in ever-increasing numbers. While the *NYSA-ILA* case involves one fund-operated hospital's immunity from a generally-applicable assessment, there is no logical difference between immunizing that one hospital and immunizing an entire health care system owned, operated or participated in by NYSA-ILA or any other fund. And, as discussed above, there is no logical difference between the regulation of quality of care or work standards in a hospital and the regulation of hospital costs. It does not take much imagination to realize that it is this broader immunity that Respondent seeks to gain from this preemption challenge, and not just the dollars it pays on this assessment.

II. THE SECOND CIRCUIT'S DECISION DIRECTLY CONFLICTS WITH THE *TRAVELERS* DECISION OF THIS COURT.

The Second Circuit's decision is incompatible with this Court's decision in *Travelers,* which is why it now presents the ramifications discussed above. It reduces *Travelers* to a narrow and inconsequential holding by finding significance only insofar as *Travelers* upholds laws that have mere indirect effects upon the assets of a plan. In doing so, the Second Circuit ignores the fundamental principles established by this Court in *Travelers; i.e.,* that Congress could not have intended ERISA to displace traditional state health care regulation, that preemption must be evaluated in light of ERISA's purpose to promote national uniformity, and that the test is not whether the state law increases costs to a plan, but whether it mandates plan decisions. That the Second Circuit would so narrowly read *Travelers* as to make it irrelevant to the rapidly evolving health care scene calls

precludes a state from regulating a provider network to the extent it enters into an arrangement with self-insured ERISA plans.

for this Court's intervention to reaffirm the principles of *Travelers.*

Referencing its earlier decision that was vacated and remanded by this Court, the Second Circuit observed that the HFA increases costs and "depletes those assets [of the Respondent ERISA plan] earmarked for the provision of health care benefits . . . ." *NYSA-ILA Medical & Clinical Servs. Fund,* 74 F.3d at 30. But, recognizing that *Travelers* rejected the notion that increased costs, by themselves, justify preemption, the Second Circuit then narrowed its rationale by distinguishing *Travelers* based on the HFA's "direct" impact upon Respondent ERISA plan. That is a futile effort to distinguish *Travelers.*

First, the Circuit Court's distinction between laws that "directly" impact upon ERISA plans from those that "indirectly" impact such plans makes little sense because it would rest ERISA preemption on whether or not there is a "middleman" between the state law and the ERISA plan.[8] But, as discussed above, if that were the test, ERISA plans would be free to operate hospitals and medical clinics immune from any state health care regulation, including licensure, medical waste, and staffing and

[8] The distinction between direct and indirect effects is one of difficult application, the line between the two often being very blurry. Indeed, it appears that the Second Circuit misapplied its own test here since the HFA has only an indirect impact on the self-insured plan. Incorporated as not-for-profit corporations under special acts of the New York Legislature, the medical centers that claim to be exempt from the HFA are separate legal entities from Respondent self-insured plan that operates them. *See* Joint Appendix in the Record below, at 142-43. While there may be a close financial and operational relationship between the entities, the fact is that the HFA was imposed on the receipts of a separate hospital corporation established by the fund, and not on the ERISA fund itself. This direct/indirect test will become even more difficult to apply as vendors and employers become partners, and previously autonomous organizations consolidate into complex networks. *See* James C. Robinson, *Health Care Purchasing and Market Changes in California,* HEALTH AFFAIRS, Winter 1995, at 117-30.

quality assurance rules, "unsettling result[s]" that would impute a congressional intent that never existed. *Travelers*, 115 S. Ct. at 1681. In fact, the distinction would allow ERISA plans to venture into a variety of new areas by providing direct services without regard to traditional state regulation. For instance, ERISA scholarship plans would be able to operate schools free of state education laws and ERISA day care plans would be able to operate day care centers free of all state day care rules.

Second, the Second Circuit's distinction would elevate form over substance by looking at a state law's source, instead of the character of its impact. Even though there is little substantive economic difference between a "payer" assessment and an identical "provider" assessment (the payer assessment is imposed on monies paid to, and the provider assessment is imposed on the same monies received by, health care providers), the Second Circuit would treat them differently under ERISA.

Third, a direct/indirect distinction fails to fit within ERISA's framework. Since, by their very nature, only self-insured plans (as opposed to other ERISA plans) can operate as health care providers, they are the only type of ERISA entity that presumably can be "directly" impacted by state health care laws. Hence, under the Second Circuit's distinction, ERISA would preempt a state health law insofar as it impacts self-insured ERISA plans, but not insofar as that law impacts commercially-insured and other types of ERISA plans. Yet, with one isolated exception described in ERISA Section 514(b)(2) (codified at 29 U.S.C. § 1144(b)(2) (1994)), ERISA's preemption provision does not differentiate self-insured plans from other types of ERISA plans. As for that sole exception, ERISA Section 514(b)(2)(A) (codified at 29 U.S.C. § 1144(b)(2)(A) (1994)), which is known as the "savings" clause, preserves certain enumerated state laws, including state insurance laws, that otherwise "relate to" ERISA plans. The so-called "deemer" clause

described in Section 514(b)(2)(B) (codified at 29 U.S.C. § 1144(b)(2)(B) (1994)), however, provides that for purposes of the savings clause, self-insured plans are not to be deemed as insurers and therefore are exempt from state laws purporting to regulate insurance. The Second Circuit's direct/indirect distinction thus effectively stretches the deemer clause concept beyond its limits by exempting self-insured ERISA plans from any law—and not merely an insurance law—that "directly" impacts such plans.

Moreover, the Second Circuit's distinction loses sight of this Court's decision in *Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825 (1988). In *Mackey*, this Court ruled that ERISA did not preempt a Georgia state garnishment law even though the law applied directly to ERISA welfare plans. In fact, it was of no consequence to this Court that in garnishing a plan under the state law, "plan trustees [were] served with a garnishment summons, [became] parties to a suit, and . . . respond[ed] and deposit[ed] the demanded funds due the beneficiary-debtor." *Id.* at 831.[9]

By distinguishing *Travelers* at the outset, the Second Circuit also failed to pay attention to this Court's defining approach toward ERISA preemption issues. In *Travelers*, this Court commenced its analysis with the well-established presumption against preemption, a canon designed to preserve the regulatory authority of the states absent clear congressional intent to supersede such authority. *Travelers*, 115 S. Ct. at 1676. Then, noting that ERISA's "relate to" language was not "helpful" in ascer-

[9] For that matter, this Court also has found preemption where a state law only indirectly affects ERISA plans. *See, e.g., Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 139 (1990) ("a state law may 'relate to' a benefit plan . . . even if the law is not specifically designed to affect such plans, or the effect is only indirect"); *c.f. Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 525 (1981) ("It is of no moment that New Jersey intrudes indirectly, through a workers' compensation law, rather than directly . . . .").

taining Congress's intent, the Court turned to ERISA's statutory purposes and legislative history as a guide to the scope of ERISA's preemption provision. *Id.* at 1677. To that end, the Court concluded that the "basic thrust of the pre-emption clause . . . was to avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans." *Id.* at 1677-78. The Court then cited some of its prior ERISA pre-emption cases to illustrate the types of laws that frustrate ERISA's uniformity objective, including laws that mandate a level of plan benefit or the type of plan structure. *Id.* at 1678 (citing *Shaw v. Delta Air Lines*, 463 U.S. 85 (1983) (holding that New York laws that prohibited ERISA plans from discriminating on the basis of pregnancy and required them to pay certain benefits "related to" ERISA plans); *FMC Corp. v. Holliday*, 498 U.S. 52 (1990) (holding that ERISA preempted a state anti-subrogation law that prohibited ERISA health plans from being structured to require reimbursement in the event of recovery from a third party)).

According to this Court, however:

> nothing in the language of [ERISA] or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a local concern.

Id. at 1680 (citations omitted). The Court explained that while the surcharges and other health care regulation may increase the cost of certain benefits, that economic effect, by itself, is insufficient to justify preemption.[10] In contrast to laws that contain substantive benefit

[10] That rule was recently followed in *Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995), *cert. denied*, 116 S. Ct. 1266 (1996), where the Eighth Circuit rejected an ERISA challenge to a two percent Minnesota provider tax. Like the HFA, the Minnesota provider tax was imposed on the gross revenue of hospitals and other health care providers. Minnesota law, however, goes one step further than the HFA by expressly authorizing health care providers to pass the costs of the tax "directly" onto third-party payers, including self-insured ERISA plans. *Id.* at 1098, quoting MINN. STAT. § 295.582 (Supp. 1993).

mandates, generally applicable health laws that merely increase costs do not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself . . . ." *Id.* at 1679.

Here, the Second Circuit did not seek to ascertain Congress's intent, the "ultimate touchstone" in every preemption question. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). The Circuit Court never attempted to determine how preemption of the HFA would further ERISA's objective in maintaining nationally uniform rules for the administration of employee benefit plans. Nor did the court cite any other statutory, legislative or policy reason supporting its preemption finding. Rather, the Second Circuit summarily affirmed its prior preemption decision—with its original infirmities[11]—based on its newly-created direct/indirect distinction. In short, the Second Circuit decided this case in spite of, and not in light of, *Travelers*.

[11] The Second Circuit preemption holding appears to have been swayed by the fact that the HFA is a health law, a fatal flaw in the Circuit Court's reasoning. In its initial opinion, the Second Circuit accepted the principle that ERISA does not preempt generally-applicable laws insofar as they affect ERISA plans, including laws that "directly" apply to such plans such as sales, utility and gasoline taxes. The Circuit Court, however, found that health laws are not generally applicable because they do "not apply broadly to every sector of society" and are "bound to affect" ERISA plans particularly. *NYSA-ILA Medical & Clinical Servs. Fund v. Axelrod*, 27 F.3d 823, 827 (2d Cir. 1994), *vacated and remanded*, 115 S. Ct. 1819 (1995), *ratified upon reconsideration*, 74 F.3d 28 (2d Cir. 1996). The problem is that this notion not only is irreconcilable with *Travelers*, it was expressly rejected when this Court observed that nothing in ERISA indicates that it "displace[s] general health care regulation." *Travelers*, 115 S. Ct. at 1680.

CONCLUSION

It is respectfully requested that this Court grant the petition of Barbara A. DeBuono, M.D., Karen Schimke and Deputy Director for a writ of certiorari.

Respectfully submitted,

MARK THOMAS
HEALTHCARE ASSOCIATION
OF NEW YORK STATE
74 North Pearl Street
Albany, NY 12207

FREDRIC J. ENTIN
AMERICAN HOSPITAL
ASSOCIATION
One North Franklin
Chicago, Illinois 60606

JEFFREY J. SHERRIN *
PHILIP ROSENBERG
SHERRIN & GLASEL
74 North Pearl Street
Albany, New York 12207
(518) 465-1275
Counsel for Amici Curiae

Dated: Albany, New York
April 30, 1996

* *Counsel of Record*